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THE article by Professor Smith, begun in this number, is the first of a series on various topics to be contributed this spring by members of the faculty of the School in tribute to the memory of Professor Langdell. These articles, together with the appreciations in the November issue, may later be published in the form of a memorial volume.

STATE INHERITANCE TAX ON STOCK OF SIMULTANEOUSLY INCORPORATED TWO-STATE CORPORATIONS. — Confusion has arisen in the application to choses in action of the provision of the New York transfer tax imposing an inheritance tax on "property within the state" belonging to a non-resident decedent.[1] Adopting the sound view that as to choses in action without physical situs and not peculiarly the creature of a particular sovereignty only the state of the creditor's domicile has jurisdiction to regulate succession at his death, New York courts first applied this provision only to negotiable or quasi-negotiable instruments actually deposited within the state,[2] to shares in domestic corporations,[3] to New York judgments,[4] and, anomalously but excusably, to money deposited in New York banks.[5] More recently, following revolutionary dicta of the United States Supreme Court,[6] they have extended its application to all choses in action running from New York citizens except those deemed inseparable from the paper evidencing them.[7] The hardship of double taxation in another state has not deterred them.[8] Policies of domestic life insurance companies alone seem exempt,[8] but the court of last resort has yet to pass upon this anomaly.

[1] N. Y. L. 1887, c. 713.
[2] Matter of Morgan, 150 N. Y. 35.
[3] Matter of Bronson, 150 N. Y. 1.
[4] Matter of Smith, 14 N. Y. Misc. 169.
[5] Matter of Houdayer, 150 N. Y. 37.
[6] See Blackstone *v.* Miller, 188 U. S. 189, where Holmes, J., extends to taxation the doctrine that jurisdiction over the debtor is sufficient for garnishment. See Chicago, etc., Ry. *v.* Sturm, 174 U. S. 710. The court finds justification for this in the aid given by the debtor's state in collecting the claim. But cannot the creditor sue elsewhere? May he not have collateral security? See 15 HARV. L. REV. 680.
[7] Matter of Clinch, 180 N. Y. 300; Matter of Hewitt, 181 N. Y. 547; Matter of Daly, 100 N. Y. App. Div. 373, affirmed 182 N. Y. 524.
[8] Matter of Gordon, 114 N. Y. App. Div. 202.

On top of these decisions, including as "property within the state" almost everything up to successively defined constitutional limits, comes a holding by the Court of Appeals in the other direction. *Matter of Cooley*, 186 N. Y. 220. A Connecticut decedent left shares in a railroad which had been simultaneously incorporated in New York and Massachusetts, and which owned approximately five-sixths of its property in the latter state. New York tax officials, arguing from the well-established doctrine that for purposes of federal jurisdiction for diversity of citizenship such a simultaneously incorporated two-state corporation may be regarded as a citizen of either state,[9] disregarded the Massachusetts incorporation and assessed the shares at their full market value. When it is considered that a corporation is not a "citizen" at all,[10] that to circumvent this difficulty a bald fiction has been invented of conclusively presuming all stockholders citizens of the state of incorporation,[11] that this fiction leads to the absurdity of conclusively presuming stockholders of simultaneously incorporated two-state corporations citizens of two states, that it will not be applied to subsequent incorporation in a second state,[11] and finally that the purpose of the fiction was to achieve what seemed a beneficent end, the doctrine seems a weak legal basis for deducing an inequitable result. Some unfortunate results of such an assessment were recently well pointed out.[12] For example, should a Californian die leaving Lake Shore stock to a collateral relative, the bequest would be subject to a tax of 15 per cent in California besides similar taxes in six other states and possibly before long to a federal tax. The Court of Appeals believed that the New York legislature intended no such legacy-grabbing, and therefore directed that the shares be valued according to such proportion of the entire property as lay within the taxing state. It is quite competent for courts to construe non-mandatory tax acts in an equitable way, and wise for them to refuse to follow the drift of former interpretation when confronted with inequitable results of alarming difference in degree. Specific authority for such equitable construction is found in the cases of a capital-stock property tax [13] and of an organization tax [14] on simultaneously incorporated two-state corporations. The court takes pains to distinguish the case of a one-state corporation owning property as a foreign corporation in another state,[15] and to exclude from the operation of its rule cases of incorporation in bad faith. As the first authoritative determination of a question of great and increasing importance, it establishes an enlightened precedent which other states are likely to follow.

The unconsidered problem of the constitutionality of the discarded rule is important. A property tax on such lines would certainly be unconstitutional because of the lack of corresponding governmental protection and as therefore a taking without due process of law.[16] But for a privilege conferred a state may exact what it please. The right of succession is not a natural right, but a privilege which the law may altogether withhold or grant

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[9] Mo. Pac. Ry. *v.* Meeh, 69 Fed. Rep. 753; Wasley *v.* Chicago, etc., Ry., 147 Fed. Rep. 608.

[10] Paul *v.* Virginia, 8 Wall. (U. S.) 168; Beale, Foreign Corp., § 79.

[11] St. Louis, etc., Ry. *v.* James, 161 U. S. 545.

[12] "The Inheritance Tax Colossus," Boston Transcript, December 8, 1906.

[13] State *v.* Metz, 32 N. J. L. 199.

[14] People *v.* N. Y., C., & St. L. Ry., 129 N. Y. 474.

[15] Matter of Palmer, 183 N. Y. 238.

[16] D. L. & W. Ry. *v.* Pa., 198 U. S. 341; Union Transit Co. *v.* Ky., 199 U. S. 194.

upon arbitrary conditions.[17] Or, if we regard this tax as on the privilege of succeeding to the decedent's membership in a New York entity, it is equally a privilege tax. The legislature may prescribe any mode of measurement of the price of its privilege. A 5 per cent tax upon a total valuation cannot be more obnoxious than a 30 per cent tax upon a one-sixth valuation. Moreover, in view of federal tolerance of state inheritance taxes on bequests to the United States [18] and bequests of United States bonds,[19] the question of unconstitutional burdening of interstate commerce seems scarcely arguable.

REVOCATION OF JOINT WILLS. — Joint wills, as regards the extent to which the law will enforce them, may be divided into three classes: *a*, joint wills of joint or separate property with no time stated as to when they shall take effect; *b*, joint wills of joint property, or separate property treated as joint, to take effect at the death of the survivor; *c*, joint reciprocal wills in which each testator provides that when he dies his property shall go to his co-testator, and sometimes after his death to an ultimate beneficiary. Through these three classes there runs a dividing line separating those in which a contractual relation is involved from those in which it is not.

Because of the nature of a will, in that it can take effect as to only the testator's property and only at his death, a will can never be really joint in the same sense as a contract. From this fact sprang the antipathy of early courts to joint wills, and the tendency of modern courts, following the intention of the parties, to treat them as separate wills by each testator. By the older theory joint wills, like joint contracts, were considered irrevocable by one party alone because of their joint quality, and therefore the decisions held that, since wills were necessarily revocable, these joint instruments could not be wills.[1] These difficulties have been obviated by the newer theory, which, wherever possible, regards the instrument as joint only in the manner of execution, but revocable by either party as to his share and admissible to probate on the death of either party as his will. This view is not found possible in the instruments of class *b*, and since they cannot be effectuated they are generally held void.[2] The wills of class *a* it is almost always possible to regard as separable, and they are accordingly revocable by either testator, without notice, either before or after the death of his co-testator.[3] In the case of class *c* it has been held that the will may be revoked by either testator as to his share, during the lives of both,[4] although notice is usually required so that the other testator may withdraw his will also.[5] Even after the death of one testator and the acceptance by the other of the benefits under the decedent's will, the survivor has been allowed to revoke his will and shut out the ultimate residuary legatee of both wills.[6]

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[17] Magoun *v.* Ill. Trust & Savings Bank, 170 U. S. 283. But see Nunnemacher *v.* State, 108 N. W. Rep. 627 (Wis.).

[18] United States *v.* Perkins, 163 U. S. 625.

[19] Plummer *v.* Coler, 178 U. S. 115. See Beale, Foreign Corp., § 763.

[1] See Hobson *v.* Blackburn, 1 Add. Eccl. 274; Clayton *v.* Liverman, 2 Dev. & B. (N. C.) 558.

[2] State Bank *v.* Bliss, 67 Conn. 317; Hershy *v.* Clark, 35 Ark. 17; Dennyson *v.* Clostert, L. R. 4 P. C. 236.

[3] See Hill *v.* Harding, 92 Ky. 76, 80; Matter of Raupp, 10 N. Y. Misc. 300; Betts *v.* Harper, 39 Oh. St. 639.

[4] Schumaker *v.* Schmidt, 44 Ala. 454.

[5] See *Ex parte* Day, 1 Bradf. Sur. (N. Y.) 476.

[6] Cawley's Estate, 136 Pa. St. 628.